FILED

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OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

MASSOOD DANESH PAJOOH,
Petitioner,

v.

THE UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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38pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the decision of the Court of Appeals was grounded on a manifestly mistaken view of the record, *i.e.*, that Petitioner's trial attorney threatened to withdraw as Petitioner's attorney in an effort to keep Petitioner off the stand only when Petitioner expressed an intention to commit perjury?

II. Whether the decision of the Fifth Circuit Court of Appeals that approved the District Court's crediting of counsel's testimony in case of conflict with other testimony conflicts with the decision of the Eleventh Circuit Court of Appeals in *Gallego v. United States*, 174 F.3d 1196 (11th Cir. 1999)?

PARTIES TO THE PROCEEDINGS

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Petitioner, Massood Danesh Pajooh, hereby petitions for a Writ of Certiorari to review an order of the United States Court of Appeals for the Fifth Circuit entered on November 30, 2001, (motion for reconsideration denied January 21, 2002), denying Petitioner's motion for a certificate of appealability. Petitioner requested a certificate of appealability in order to appeal the District Court's denial of his 28 U.S.C. §2255 motion following a hearing on remand from the Court of Appeals. Petitioner alleged in his 28 U.S.C. §2255 motion a violation of his constitutional right to testify at his trial.

ORDER BELOW

The order of the United States Court of Appeals for the Fifth Circuit denying Petitioner's motion for a certificate of appealability is styled:

> United States of America v. Massood Danesh Pajooh
> No. 01-20858

The order of the Court of Appeals is dated November 30, 2001, and is unpublished. A copy of the order is attached to this Petition in Appendix A.

The order of the Court of Appeals denying Petitioner's motion for reconsideration is dated January 21, 2002, and is attached to this Petition in Appendix B.

The opinion of the Court of Appeals remanding Petitioner's case to the District Court for further consideration of Petitioner's claim of a violation of his constitutional right to testify at his trial is dated January 25, 2000, and is unpublished. A copy of that opinion is attached to this Petition in Appendix C.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied Petitioner's motion for a certificate of appealability on November 30, 2001. Petitioner's motion for reconsideration was denied on January 21, 2002. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. CONST. amend. V:

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

U. S. CONST. amend VI:

> In all criminal prosecutions, the accused shall have . . . compulsory process for obtaining witnesses in his favor . . .

STATEMENT OF THE CASE

Petitioner was charged in a two-count indictment filed in the Southern District of Texas with conspiracy to corruptly endeavor to influence, obstruct, and impede the due administration of justice in violation of 18 U.S.C. §1503 and with aiding and abetting to influence, obstruct, and impede the due administration of justice in connection with a pending proceeding in violation of 18 U.S.C. §§2 and 1503. (Vol. 3,

Doc. 1).[1] Petitioner was found guilty by a jury of both counts in the indictment. (Vol. 3, Doc. 74). Petitioner's conviction was affirmed on appeal by the United States Court of Appeals for the Fifth Circuit in an unpublished opinion in cause number 97-20185. (Vol. 4, Doc. 173).

Subsequent to his conviction being affirmed on appeal, Petitioner filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. §2255. (Vol. 4, Doc. 182). The District Court denied Petitioner the relief he requested in that motion. (Vol. 2, Doc. 215). The District Court also ordered that a certificate of appealability not issue.

Petitioner sought a certificate of appealability from the Court of Appeals. On January 25, 2000, that Court entered a judgment granting Petitioner's request in part, denying the request in part, and vacating and remanding Petitioner's case to the District Court. *United States v. Massood Danesh Pajooh*, No. 99-20870 (5th Cir. January 25, 2000) (See Appendix C). Specifically, the Court of Appeals said that Petitioner

> . . . made the requisite showing [for the issuance of a certificate of appealability] with regard to his claim that his constitutional rights were violated when his counsel refused to permit him to testify.

The Court of Appeals then granted Petitioner a certificate of appealability on this issue and remanded to the District Court for further development of the facts.

---

[1] The references to Vol. and Doc. throughout this Petition refer to the record on appeal in the court below.

Pursuant to the mandate of the Court of Appeals, the District Court held an evidentiary hearing on Petitioner's 28 U.S.C. §2255 motion. Following that hearing, the District Court entered findings of fact and conclusions of law, and an order denying the requested relief. (Vol. 1, Docs. 248 and 249). A copy of the District Court's findings is attached in Appendix D.

The District Court denied Petitioner's request for a certificate of appealability. (Vol. 1, Doc. 256). Petitioner then sought a certificate of appealability from the Court of Appeals for the Fifth Circuit. The Court of Appeals held that Petitioner did not show that the District Court's factual findings were clearly erroneous and that Petitioner did not show that reasonable jurists would debate the District Court's decision that Petitioner was not denied his constitutional right to testify. (See Appendix A). The Court of Appeals then denied Petitioner's request for a certificate of appealability.

REASONS FOR GRANTING THE WRIT

Question for Review I

Whether the decision of the Court of Appeals was grounded on a manifestly mistaken view of the record, *i.e.*, that Petitioner's trial attorney threatened to withdraw as Petitioner's attorney in an effort to keep Petitioner off the stand only when Petitioner expressed an intention to commit perjury?

Reasons for Granting the Writ

Petitioner expressed a desire, on more than one occasion, to exercise his constitutional right to testify at his trial. Duncan Neblett, Stephen Hilow, Manssor

Daneshpajooh, and Petitioner himself all testified at the hearing on Petitioner's 28 U.S.C. §2255 motion about Petitioner's repeated requests to testify. (Vol. 15, pp. 12-15, 18-19, 32-33, 35-37, 58-59, 62-63, 83-96, 101-102, 105, 107). Even Petitioner's trial attorney acknowledged that before and during trial Petitioner wanted to testify. (Vol. 15, pp. 162, 165).

Petitioner testified at the hearing on his 28 U.S.C. §2255 motion that he did not voluntarily waive his right to testify. Rather, he was intimidated and coerced out of testifying by his trial attorney. (Vol. 15, p. 104). Petitioner's testimony was corroborated by several witnesses, including Duncan Neblett, attorney for Petitioner's co-defendant. (*See*, e.g. Vol. 15, pp. 18-19, 35-37, 62-63).

The Court of Appeals interpreted the testimony before the District Court and the District Court's findings as follows:

> The district court determined that Kuniansky [the trial attorney] did not threaten to withdraw but that Kuniansky did advise Pajooh that he could not represent him if Pajooh decided to commit perjury. Duncan Neblett, a codefendant's counsel, testified that Kuniansky threatened to withdraw if Pajooh insisted on testifying because Kuniansky believed Pajooh might perjure himself and face an additional charge of perjury.

(See Appendix A).

The holding that Petitioner's trial attorney did not threaten to withdraw as Petitioner's trial attorney in an effort to keep Petitioner off the stand is manifestly mistaken and

clearly erroneous. A number of witnesses, including the attorney for Petitioner's codefendant, heard Petitioner's trial attorney tell Petitioner, *during his trial*, that he could not testify and that if he wanted to testify, he should get another attorney. (Vol. 15, pp. 19, 35, 62).

Although Petitioner's trial attorney denied threatening to withdraw during Petitioner's trial, he did admit to being abrupt and short with Petitioner during the trial. (Vol. 15, pp. 168-169). The one occasion on which Petitioner's trial attorney admitted that he threatened to withdraw as Petitioner's attorney was well in advance of Petitioner's trial when Petitioner proposed presenting perjured testimony to the jury. (Vol. 15, p. 140). The attorney, however, testified that he explained to Petitioner that he could not do this and Petitioner never brought up that matter again. (Vol. 15, pp. 161-162). It is therefore manifestly mistaken and clearly incorrect to conclude that this alleged discussion of perjury had anything to do with the fact that Petitioner did not testify, much less that it was the deciding factor. (See excerpts of the trial attorney's testimony in Appendix E).

Similarly, the statement by the Court of Appeals that Duncan Neblett testified that the reason Petitioner's trial attorney threatened to withdraw is because the attorney believed Petitioner might perjure himself and face an additional charge of perjury is not supported by the record. The record shows that Duncan Neblett testified that Petitioner's attorney told Petitioner that if he insisted on testifying he should get another attorney. (Vol. 15, p. 19). This threat by Petitioner's attorney had nothing to do with the allegation that Petitioner might commit perjury. Neblett was not a party to the alleged perjury discussion and did not testify that the attorney's concern over Petitioner committing perjury motivated the attorney to keep Petitioner off the stand. The

alleged perjury discussion occurred long before trial and the threats to withdraw testified about by Neblett and other witnesses occurred right before and during the trial. (See excerpts of Duncan Neblett's testimony in Appendix F).

The Court of Appeals' order is based on the faulty premise that the entire discussion concerning the attorney not allowing Petitioner to testify revolved around the perjury question, which is simply not true. The Court of Appeals goes so far as to emphasize in its short order that "the right to testify does not include the right to commit perjury." This statement simply highlights the Court of Appeals misunderstanding of the record. Since the order of the Court of Appeals is grounded in this manifestly mistaken view of the record, this petition for a writ of certiorari should be granted and this cause should be remanded to the Court of Appeals. *See*, *Burden v. Zant*, 510 U.S. 132, 114 S.Ct. 654, 126 L.Ed.2d 611 (1994) (remanding case for further consideration because of manifestly mistaken view of record).

Question for Review II

Whether the decision of the Fifth Circuit Court of Appeals that approved the District Court's crediting of counsel's testimony in case of conflict with other testimony conflicts with the decision of the Eleventh Circuit Court of Appeals in *Gallego v. United States*, 174 F.3d 1196 (11th Cir. 1999)?

Reasons for Granting the Writ

The District Court concluded that Petitioner's trial counsel did not refuse to permit him to testify, that Petitioner knew of his constitutional rights, and that Petitioner was not denied his constitutional right to testify in his own defense.

(Vol. 1, Doc. 248, p. 972). The District Court reached this conclusion by making a credibility choice between Pajooh and his trial attorney. The Court of Appeals refused to examine the District Court's credibility choice saying: "The district court determined that Kuniansky's testimony was more credible than Petitioner's testimony. This Court will not second-guess a district court's credibility determinations." (See Appendix A, p. 2).

If the Court of Appeals had examined the basis for the District Court's credibility determination, it would have found that the District Court simply chose to believe the testimony of Petitioner's trial attorney despite the overwhelming evidence contrary to that testimony. In effect, the District Court chose to believe Petitioner's trial attorney no matter what.

In *Gallego v. United States*, 174 F.3d 1196 (11th Cir. 1999), the Eleventh Circuit held:

> . . . we cannot adopt a per se "credit counsel in case of conflict rule," which allows that in any case where the issue comes down to the "bare bones testimony" of the defendant against the contradictory testimony of counsel, defendant is going to lose every time.

Id. at 1198-99. The Eleventh Circuit then remanded for a new evidentiary hearing where credibility could be properly weighed. That is what the Fifth Circuit should have done. Because the Fifth Circuit did not do that, this Court should grant this Petition for a Writ of Certiorari and remand to the Fifth Circuit for further consideration of this issue.

CONCLUSION

BASED ON THE FOREGOING ARGUMENTS, Petitioner prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 01-20858
USDC No. H-98-CV-3402
USDC No. H-96-CR-149-1

[Filed November 30, 2001]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
v.	)
	)
MASSOOD DANESH PAJOOH,	)
	)
Defendant-Appellant.	)
	)

Appeal from the United States District Court
for the Southern District of Texas

ORDER

Massood Danesh Pajooh, federal prisoner # 72872-079, has filed a motion for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. §2255 motion after this court remanded the case for consideration of whether he was denied the constitutional

right to testify at trial. To obtain a COA, Pajooh must make a substantial showing of the denial of a constitutional right. See 28 U.S.C. §2253(c) (2). To make such a showing, he must demonstrate that his motion involves issues which are debatable among reasonable jurists, that a court could resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed further. Hernandez v. Johnson, 213 F.3d 243, 248 (5th Cir.), cert. denied, 531 U.S. 966 (2000).

Pajooh argues that the district court erred in determining that the testimony of his counsel was more credible than his testimony. He also argues that the district court did not address his argument that his attorney intimidated him into waiving his right to testify and, therefore, the waiver was not voluntary.

After conducting an evidentiary hearing, the district court determined that Pajooh was not denied the right to testify at trial. The district court determined Richard Kuniansky, Pajooh's counsel, advised Pajooh that he had the right to testify; that it was Pajooh's decision whether to testify; and that Kuniansky strongly advised Pajooh not to testify at trial. The district court determined that Kuniansky did not threaten to withdraw but that Kuniansky did advise Pajooh that he could not represent him if Pajooh decided to commit perjury. Duncan Neblett, a codefendant's counsel, testified that Kuniansky threatened to withdraw if Pajooh insisted on testifying because Kuniansky believed Pajooh might perjure himself and face an additional charge of perjury. The district court determined that Kuniansky's testimony was more credible than Pajooh's testimony. This court will not second-guess a district court's credibility determinations. See United States v. Garza, 118 F.3d 278, 283 (5th Cir. 1997). Pajooh has not shown that the district

court's factual findings were clearly erroneous. See United States v. Faubion, 19 F.3d 226, 228 (5th Cir. 1994) (in reviewing a district court's denial of a §2255 motion, this court examines the factual findings for clear error and conclusions of law de novo). The right to testify does not include the right to commit perjury. United States v. Dunnigan, 507 U.S. 87, 96 (1993).

Pajooh has not shown that reasonable jurists would debate the district court's decision that he was not denied the constitutional right to testify. See Hernandez, 213 F.3d at 248. Accordingly, Pajooh's COA motion is DENIED.

/s/ _____

JERRY E. SMITH
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20858

[Filed January 21, 2002]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
v.	)
	)
MASSOOD DANESH PAJOOH,	)
	)
Defendant-Appellant.	)
	)

Appeal from the United States District Court
for the Southern District of Texas, Houston

Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:

A member of this panel previously denied Appellant's motion for certificate of appealability. The panel has considered Appellant's motion for reconsideration. IT IS ORDERED that the motion is DENIED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 99-20870

[Filed January 25, 2000]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
v.	)
	)
MASSOOD DANESH PAJOOH,	)
	)
Defendant-Appellant.	)
	)

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-98-CV-3402

Before HIGGINBOTHAM, DeMOSS and STEWART, Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Massood Danesh Pajooh seeks a certificate of appealability ("COA") to appeal the district court's denial of his 28 U.S.C. §2255 motion. He argues that trial counsel was ineffective in failing to advise him properly as to pleading guilty, in failing to present a proper defense theory, in disallowing him to testify on his own behalf, and in failing to conduct adequate pretrial investigation. He also asserts that he was denied his constitutional right to testify and that the Government engaged in misconduct when it used the perjured testimony of Michael Kent Stephens.

To obtain a COA, Pajooh must make a substantial showing of the denial of a constitutional right. See §2253 (c) (2) . He has not made such a showing with regard to any of his claims of ineffective assistance of counsel. He has, however, made the requisite showing with regard to his claim that his constitutional rights were violated when his counsel refused to permit him to testify. Accordingly, we GRANT him a COA on this issue, VACATE the district court's judgment, and REMAND with instructions that Pajooh is to file a supplement to his § 2255 motion setting forth in greater detail the circumstances surrounding his failure to testify. See United States v. Martinez, 181F.3d 627, 628-29 (5th Cir. 1999).

If, once this is done, the record does not conclusively show that Pajooh is entitled to no relief, the district court is directed to conduct an evidentiary hearing to determine whether Pajooh was denied his right to testify. See United States v. Kuches,635 F.2d 449, 451 (5th Cir. 1981); §2255. Pajooh's request for COA on his other issues is DENIED. His motion for an expedited appeal is DENIED as moot.

COA GRANTED in part, DENIED in part; VACATED AND REMANDED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CRIMINAL NO. H-96-149
CIVIL ACTION NO. H-98-3402

[Filed July 30, 2001]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
v.	)
	)
MASSOOD DANESH PAJOOH,	)
	)
Defendant-Appellant.	)
	)

FINDINGS OF FACT & CONCLUSION OF LAW

The Fifth Circuit Court of appeals granted to Massood Danesh Pajooh a certificate of appealability on one issue, "his claim that his constitutional rights were violated when his counsel refused to permit him to testify." Fifth Circuit *Per Curiam*, January 25, 2000 (Instrument No. 224). The Fifth Circuit further directed Pajooh to supplement his §2255 motion, "setting forth in greater detail the circumstances surrounding his failure to testify." *Id.* This district court was "directed to conduct an evidentiary hearing to determine whether Pajooh was denied his right to testify," if after the

filing of Pajooh's supplement to his §2255, "the record does not conclusively show that Pajooh is entitled to no relief." *Id.* Pajooh filed his supplement, and a hearing was held on June 30, 2000.

"Every defendant is privileged to testify in his own defense..." *Harris v. New York*, 401 U.S. 44,51,107 S.Ct. 2704, 2708-09 (1987) (quoting *Faretta v. California*, 422 U.S. 806, 819, n. 15, 95 S. Ct. 2525, 2533 n. 15 (1975)).

"Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right." *Brooks v. Tennessee*, 406 U.S. 605, 612, 92 S. Ct. 1891, 1895 (1972). Nevertheless, the right is "granted to the defendant personally and not to his counsel." *United States v. Martinez*, 181 F. 3rd 627, 628 (5th Cir. 1999) citing *Rock*).

Three witnesses were called to testify about conversations they overheard or witnessed between Pajooh and his trial attorney, Richard Kuniansky, in which Pajooh expressed a desire to testify at the trial, and Kuniansky told Pajooh he did not want Pajooh to testify. One of these three witnesses, Duncan Neblett, the attorney for co-defendant Ali Reza Dadi, also testified that he and Kuniansky had had discussions concerning whether either client should testify. Kuniansky testified that Pajooh had expressed his desire to testify on numerous occasions, that he had advised Pajooh not to testify, and that they had left the question open throughout the trial.

The only material issue in dispute is whether Kuniansky told Pajooh that Pajooh had a right to testify and

that it was Pajooh's decision. Kuniansky testified at the hearing that he did give Pajooh that advice and that he told Pajooh that it was his further advice that Pajooh should not testify. Kuniansky also testified at the hearing that, after the government rested its case, Pajooh had not asked him to be put on the stand. Kuniansky was under the impression that Pajooh had ultimately agreed with Kuniansky that Pajooh should not testify. Pajooh maintains that Kuniansky never told him he had a right to testify nor that it was Pajooh's decision. Rather, Pajooh maintained, he believed that Kuniansky had prevented him from testifying at his trial because Kuniansky told him that if he insisted upon testifying Kuniansky would ask to be dismissed from the case, and Pajooh would have to get another lawyer. He also testified that Kuniansky "put me under duress not to testify" (Transcript of Hearing (Instrument No. 236) 104, lines 3-4) and "forced me not to testify." Transcript of Hearing 128, lines 3-4.

The Court finds the testimony of Pajooh not to be credible. Among other reasons, Pajooh had more than one opportunity to dispense with the services of Kuniansky after Kuniansky advised him not to testify. First, Massood Danesh Pajooh's brother Manssor Danesh (Max) Pajooh and his friend Stephen Hilow testified at the hearing that several days before the commencement of the trial they advised Massood Pajooh to get another lawyer after they heard Kuniansky tell him that Massood Pajooh would not testify. Massood Pajooh told his brother and Hilow that he thought Kuniansky was an experienced professional, a former prosecutor, well acquainted with federal court who was willing to work with him and not charge him an up front cash retainer. Pajooh told them that he believed he could talk Kuniansky into letting him

testify. Pajooh confirmed that he held this opinion of Kuniansky going into the trial and during the trial. Second, after jury selection Kuniansky became aware of a possible conflict in that one of the Government witnesses was a former client of Kuniansky. He brought the matter to the attention of the Court, and Pajooh was given an opportunity to obtain another lawyer at that time. Pajooh declined to jettison Kuniansky although he testified at the hearing that he was still at loggerheads with Kuniansky over whether he would take the stand.

Pajooh's testimony at the hearing that he was unaware of his right to testify and unaware that he, not his lawyer, was the one to decide whether to testify or not is also not credible. Massood Danesh Pajooh is a mature man an inventor and a sophisticated and successful businessman with a master's degree. He has been involved in many civil lawsuits, at which he did testify, and he was acquitted of state criminal charges after testifying at his trial. He has hired numerous attorneys in matters ranging from patents to criminal charges. In this federal criminal case he hired and fired three attorneys. With all of this experience, it is not believable that Pajooh did not know he had a right to testify and that he could make that decision and insist upon it even if his attorney strongly urged him not to testify.

Richard Kuniansky is a twenty-three year attorney, board certified in criminal law by the State of Texas. He is an officer of the Court. The Court finds that he is a credible witness. Kuniansky strongly advised his client not to testify, but he advised his client he had a right to testify and that it was a decision Pajooh had to make for himself. Kuniansky

denied that he had threatened to withdraw, except when he felt that Pajooh might perjure himself. At the June 30, 2000 hearing Kuniansky testified, "I believe it was my professional obligation to advise him that it was not in his best interest to take the stand, but that it was not my obligation to keep him off the stand. Transcript of Hearing 169, lines 7-13.

Pajooh's memory of the events before and during his trial are inaccurate and clouded no doubt by the anxiety he felt at the trial and his disappointment at being found guilty. For example, Pajooh made much at the hearing of the so-called "scam" defense, but that Pajooh's opposition was to the characterizing of the defense as a "scam" because such a word would ruin his reputation as a reputable businessman. Pajooh knew he could testify if he insisted upon it, but he did not because despite his desire to testify, he trusted Kuniansky to defend him. In hindsight, after being found guilty, Pajooh now believes his trust was misplaced.

The Court finds that Richard Kuniansky, Massood Danesh Pajooh's trial counsel, did not refuse to permit him to testify. Pajooh knew of his rights and was not denied his constitutional right to testify in his own defense.

SIGNED at Houston, Texas, this 30th day of July, 2001.

/s/ _____
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL NO. H-96-149
CIVIL ACTION NO. H-98-3402

[Filed July 30, 2001]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
v.	)
	)
MASSOOD DANESH PAJOOH,	)
	)
Defendant-Appellant.	)
	)

ORDER

In accordance with the Findings of Fact and Conclusion of Law filed today, it is hereby

ORDERED that the Petitioner Massood Danesh Pajooh's Supplemental Motion Under 28 USC §2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody and Incorporated Brief is **DENIED**, and this case is **DISMISSED** on the merits.

SIGNED at Houston, Texas, this 30th day July, 2001.

/s/ _____
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX E

EXCERPTS OF RICHARD KUNIANSKY'S TESTIMONY

[P. 161] ...case and may or may not be opening himself up to some further prosecution.

Q. All right. So, when you say "close," I mean, there was some discussion that you had with Mr. Pajooh where you warned him if he got on the stand he might have new charges brought against him?

A. Yes, that that was a possibility.

Q. Now, you also mentioned that at one point Mr. Pajooh indicated to you that he was going to commit perjury if he testified?

A. Correct.

Q. I mean, did you ever tell Duncan Neblett that that was one of the reasons why you didn't want to put Mr. Pajooh on the stand?

A. Well, I don't think that had to do with putting him up on the stand. My recollection is that that occurred earlier on and we had gotten over that hurdle. I mean, I had told him that it doesn't work that way and, you know, you can't tell me that this -- A happened, but I'm going to testify to B.

Q. All right. So, then as the trial approached and during the

trial when Mr. Pajooh was asking to testify, your concern at that time was not that he wanted to get onto the stand and commit perjury?

A. Correct.

Q. You had already convinced him that that wasn't proper and [P.162] he couldn't do that?

A. I think I had, yes.

Q. Well, he never brought that up again?

A. Correct.

Q. And so he was concerned about testifying about other matters that he wanted to explain to the jury? And I know that's a bad question.

But he was still concerned during the trial, was he not, about wanting to testify?

A. We had discussions, yes, all the way through trial up to the very end.

Q. Well, would it be fair to say that even starting before trial and through trial Mr. Pajooh brought up testifying a number of times?

A. Yes.

Q. Was he very persistent in his desire to testify?

A. I would disagree with that statement.

Q. Well, how often would he bring up his desire to testify?

A. We discussed probably on more than a dozen occasions whether or not it would be in his best interest to testify. I was probably as persistent at bringing it up as he was persistent. I mean, it was an ongoing discussion on what would be--in his best interest.

Q. Well, Mr. Pajooh is an intelligent person, is he not?

A. Very much so, in my opinion....

APPENDIX F

EXCERPTS OF DUNCAN NEBLETT'S TESTIMONY

... [P. 4]THE COURT: All right. Anyone who's been told that he or she is going to be a witness, you should step outside the courtroom and wait to be called and not discuss your testimony with anyone except the lawyers involved in the case.

THE CASE MANAGER: Will you raise your right hand, please.

(Daniel Duncan Neblett, III, Defendant's Witness, Sworn)

MR. ROBERT UDASHEN: May I proceed, Your Honor?

THE COURT: Yes, you may.

MR. ROBERT UDASHEN: Thank you.

DIRECT EXAMINATION

BY MR. ROBERT UDASHEN:

Q. Would you state your name for the judge, please.

A. Daniel Duncan Neblett, III.

Q. And, Mr. Neblett, how are you employed?

A. I'm an attorney.

Q. And where do you practice, Mr. Neblett?

A. Here in Houston at 5 Greenway Plaza.

Q. How long have you been licensed as an attorney?

A. Since 1993.

Q. And are you -- and I see you were licensed in Texas at that time?

A. Yes.

Q. And are you also licensed to practice here in the Southern...

[P.16] Q. Well, let me back up. You said that you and Mr. Kuniansky had conversations about whether Mr. Pajooh was going to testify at the trial; is that correct?

A. Yes, about whether any of our clients were going to testify.

Q. Okay. So, basically in terms of discussing trial strategy, did the two of you talk about whether Mr. Dadi and Mr. Pajooh should or should not testify at the trial?

A. Yes, we did.

Q. And what did Mr. Kuniansky tell you about whether he thought Mr. Pajooh should or should not testify?

A. He told me he thought he should not testify.

Q. Did he express to you any reasons why he thought he should not testify?

A. The only reason that I recall that he remember -- that I remember him expressing was -- well, I guess there were two. One, that it would be negligence on our part to call these defendants as witnesses and have them testify. No. 2, he was fearful that the government might bring some additional charges against-our-clients-if they were to testify.

Q. Did Mr. Kuniansky explain to you what he meant by it would be negligent if you let your clients testified?

A. No, but I knew what he meant.

Q. When you say you knew what he meant, what do you mean by that?

[P.17] A. Well, as a criminal defense lawyer, it's always risky to let your -- to put your client on the stand and have them testify. So, I mean, he didn't have to explain it to me.

Q. All right. Did Mr. Kuniansky explain to you what he meant by there might be additional charges brought against these clients if they were allowed to testify?

A. No. But I assumed he meant perjury, because jeopardy would attach once the trial started and the men -- if these men testified. So, I would assume that he was talking about perjury.

Q. Now, did Mr. Kuniansky ever -- well, let me back up a second. In your presence did Mr. Kuniansky ever explain to Mr. Pajooh that he had a right to testify if he wanted to and it was his decision, anything along those lines?

A. No, not that I recall.

Q. Did you and Mr. Kuniansky ever talk about the fact that Mr. Pajooh wanted to testify at the trial?

A. Yes, we did.

Q. And did Mr. Kuniansky tell you that he was going to defer to Mr. Pajooh's desire-to testify or he was not going to?

A. He pretty much indicated to me that he was not going to.

Q. When you say pretty much indicated to you, I mean, how did he do that? I mean, what --

A. Well, basically it was, you know, neither one of us wanted to let our clients testify and it wasn't much of a discussion [P.18] about it and we both agreed that it would probably not be a smart move on our part. So, we discussed it and he made it clear to me that he was not going to let Mr. Pajooh testify and, you know, it was clear in my mind and I indicated to him that I was not going to put Mr. Dadi on the stand.

Q. When you say Mr. Kuniansky made it clear to you that he was not going to let Mr. Pajooh testify, I mean, was that expressed to you in strong terms or do you recall how he expressed that to you?

A. I would be guessing, but -- no, I wouldn't be guessing. would say that he expressed that to me in strong enough terms as to where it would be laughable for us to put our clients on the stand.

Q. And I think that the next occasion you said that you remember some discussion between Mr. Pajooh and Mr. Kuniansky about testifying occurred during the trial?

A. During or right before the trial, correct.

Q. Okay. And what do you recall about that discussion between Mr. Pajooh and Mr. Kuniansky about testifying?

A. We were in this foyer outside this courtroom and there was -- my client was present. Mr. Pajooh was present. I believe Max Pajooh was present. Some other members of the Dadi family and the Pajooh family were present. It could have been a couple more people present. And Mr. Pajooh and Mr. Kuniansky were engaged in sort of a -- I wouldn't say an [P.19] argument but an emotional conversation and Mr. Pajooh wanted to testify and Mr. Kuniansky told him that if he was insisting on testifying, that he would need to get another lawyer.

Q. Do you remember Mr. Kuniansky's tone of voice when he told Mr. Pajooh he would need to get another lawyer?

A. Generally.

Q. And what was that tone?

A. Stern but not angry, you know, just matter of fact.

Q. Did he raise his voice?

A. No.

Q. Would you characterize it or would it be fair to characterize his tone as being forceful?

A. It didn't seem forceful to me. I don't know how it seemed to Mr. Pajooh. So, I wouldn't know how it seemed to Mr. Pajooh. I would be speculating.

Q. Were you around Mr. Pajooh and Mr. Kuniansky enough to know whether Mr. Pajooh was persistent about bringing up his desire to testify?

A. Yes, I was. And he was. He always wanted to testify.

Q. What was your impression particularly during the trial of Mr. Kuniansky's reaction to Mr. Pajooh continually bringing up that matter?

MR. BABCOCK:- Objection, Your Honor. The witness testified that there were only three occasions and at best two, and one of the occasions he cannot recall whether it was [P.20] during or before the trial.

THE COURT: Sustained.

BY MR. ROBERT UDASHEN:

Q. Now, Mr. Pajooh did not testify at the trial; is that correct?

A. No, he didn't.

Q. Do you know why he did not testify at the trial?

A. Well, I think I know why.

Q. And why is that?

A. Because Mr. Kuniansky either wouldn't let him or told him he shouldn't, and I think that's the only reason. If it had been up to Mr. Pajooh, I fully believe --

MR. BABCOCK: Objection, Your Honor. He's testifying as to what was in Mr. Pajooh's mind.

THE COURT: Sustained.

BY MR. ROBERT UDASHEN:

Q. Based on what Mr. Pajooh told you, did he want to testify?

A. Yes.

Q. Did Mr. Pajooh ever tell you that after listening to Mr. Kuniansky, he had decided it would be best not to testify?

A. I'm sorry, could you repeat that?

Q. Did you ever hear Mr. Pajooh express the opinion that he agreed with Mr. Kuniansky that he should not testify?

A. No.

Excerpts of Duncan Neblett's Testimony

Q. Did Mr. Pajooh eye, say anything like, "Well,....